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Students' Rights Versus Administrators' Immunity: Goss v. Lopez and Wood v. Strickland

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STUDENTS' RIGHTS VERSUS ADMINISTRATORS' IMMUNITY: *GOSS v. LOPEZ* AND *WOOD v. STRICKLAND*

INTRODUCTION

A dramatic change in the legal relationship between school authorities and students has taken place within the past 15 years.[1] During this period there has been clear judicial recognition that students are entitled, within bounds, to the protections of the Federal Constitution.[2] Consequently, public school impingement upon a student's fundamental constitutional rights is appropriate only in response to material and substantial interference with school discipline.[3] In accordance with this development, the modern public school administrator, once viewed as a substitute for the student's parent,[4] is now regarded as an agent of the state.[5] As such, the school administrator must count among his professional obligations the duty to protect the constitutional rights of his stu-

[1] The expansion of student rights may be seen as a direct outgrowth of litigation involving student participation in the civil rights movement and the anti-Vietnam War protests. In the landmark case of Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), several black students were expelled from a public college for participating in a civil rights sit-in. Since the expulsions had been imposed without prior notice or a hearing, the court enjoined the dismissals on the ground that the students' rights to due process had been violated. 294 F.2d at 158-59. In another leading case, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969), the refusal to allow students to wear black armbands as a protest against the Vietnam War was held to be a violation of the students' right of free speech. *See generally* M. NOLTE, DUTIES AND LIABILITIES OF SCHOOL ADMINISTRATORS (1973) [hereinafter cited as NOLTE].

[2] *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

Id. at 511.

[3] *Id.* at 509, *quoting* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

[4] The legal relationship of a school administrator to a student has traditionally been defined by the doctrine of in loco parentis, according to which the administrator stands in the place of the student's parent. The administrator assumes some of the rights and authority normally held by the parent, but only in "matters relating to education and conduct within the school." L. PETERSON, R. ROSSMILLER & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 404 (1969). The legality of an administrator's action under the doctrine of in loco parentis would depend upon "whether the administrator, acting in his capacity as a foster parent, has acted as the average, normally prudent parent would have acted under the circumstances." NOLTE, *supra* note 1, at 124. *See also id.* at 137.

[5] *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969), wherein the Court characterized disciplinary procedures of the school as action taken by "the State in the person of school officials."

dents, and the legality of his behavior will be measured in terms of his respect for or denial of those rights.[6]

It was early established that students are entitled to such fundamental rights as free speech.[7] The courts, however, have only recently begun to consider the precise nature of a student's right to education[8] and, more specifically, the procedures which an official must follow prior to removing a student from public school.[9] Although courts have uniformly held that expulsion constitutes so severe a deprivation as to warrant compliance with the dictates of due process,[10] far less unanimity of opinion has existed as to the

[6] NOLTE, *supra* note 1, at 125. *See also* Comment, *Damages Under § 1983: The School Context*, 46 IND. L.J. 521 (1971).

[7] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Id. at 506. Courts have also recognized the right of students to form associations and groups. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972) (college could not withhold official recognition from a chapter of Students for a Democratic Society absent showing that the association would pose a substantial disruption). *See also* A. MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION (1974); Denno, *Mary Beth Tinker Takes the Constitution to School*, 38 FORDHAM L. REV. 35 (1969); Keller & Meskill, *Student Rights and Due Process*, 3 J.L. & EDUC. 389, 392 (1974); Smith, *The Constitutional Parameters of Student Protest*, 1 J.L. & EDUC. 39 (1972).

There is considerable division among the circuits as to whether public schools have the right to regulate a student's appearance by enforcing hair and dress codes. *Compare* Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972) (student has right to freedom of appearance under the first and ninth amendments) *with* King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972) (dress and hair length codes not violative of students' right to due process). *See generally* A. LEVINE, THE RIGHTS OF STUDENTS (1973); H. PUNKE, SOCIAL IMPLICATIONS OF LAWSUITS OVER STUDENT HAIRSTYLES (1973); Fortenberry, *Hirsute Jurisprudence: An Essay in Constitutional Methodology*, 50 ST. JOHN'S L. REV. 1 (1975).

[8] *See* notes 36-63 and accompanying text *infra*.

[9] *See* notes 10-12 *infra*.

[10] *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). The *Dixon* court held that due process procedures are required prior to any exclusion from a tax-supported college if the exclusion is of sufficient length to constitute an expulsion. In Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969), the court applied the *Dixon* requirement of due process to public elementary and secondary schools. Since the *Dixon* decision, no lower federal court has sanctioned expulsions absent adherence to the due process clause. Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975); *see, e.g.*, Black Coalition v. Portland School Dist., 484 F.2d 1040, 1045 (9th Cir. 1973); Hagopian v. Knowlton, 470 F.2d 201, 211 (2d Cir. 1972); Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Soglin v. Kauffman, 295 F. Supp. 978, 984 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). For an exhaustive compilation of federal precedent, see cases listed in Goss v. Lopez, 419 U.S. 565, 576-78 n.8 (1975). *See also* General Order on Judicial Standards of Procedure and Substance, 45 F.R.D. 133, 147 (W.D. Mo. 1968) (en banc), wherein the court set up standards for "final expulsion, indefinite or long term suspension, dismissal with deferred leave to reapply." The enunciated standards require specific charges, an opportunity for a hearing of the student's position, and that no action be taken except on the basis of "substantial evidence." The court noted that there was no necessity for either representation by legal counsel or other features of a criminal investigation. *Id.* at 147-48.

need for due process in the imposition of suspensions,[11] particularly those of short duration.[12]

In *Goss v. Lopez*[13] the Supreme Court ruled that preceding suspensions of 1-to-10 days' duration,[14] students in public elementary and secondary schools have a right to minimal due process protection.[15] Shortly thereafter, in *Wood v. Strickland*,[16] the Court held that school administrators and board of education members enjoy only a qualified immunity from personal liability in civil actions for damages resulting from the wrongful deprivation of a student's constitutional rights.[17] These decisions offer a further clarification of the constitutional rights protecting a public school student as well as new standards by which to judge the actions of administrators who may infringe upon such rights. They represent a choice by the Supreme Court to continue the legal trend away from viewing the schools as parental surrogates and to place greater liability upon officials whose actions violate students' rights.

[11] Suspension, a less severe sanction than expulsion, may be indefinite or of a specific duration, from a maximum of one day to as long as several months. *See* Flygare, *Short-Term Student Suspensions and the Requirements of Due Process*, 3 J.L. & EDUC. 529 n.3 (1974) [hereinafter cited as Flygare].

[12] *Compare* Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971) (30-day suspension added onto 10-day suspension merits due process procedures) *and* Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) (3-day suspension necessitates due process) *with* Hernandez v. School Dist. No. 1, 315 F. Supp. 289 (D. Colo. 1970) (25-day suspension does not merit due process) *and* Jackson v. Hepinstall, 328 F. Supp. 1104, 1106 (N.D.N.Y. 1971) (due process not violated by a 5-day suspension because it "cannot rationally be compared with instances of expulsion or significant suspension periods"). Other courts have found that suspensions of any duration require compliance with the due process clause. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972). *See also* notes 20-21 *infra*.

[13] 419 U.S. 565 (1975), *aff'g* Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973).

[14] The *Goss* Court specifically noted that its ruling applies "solely to the short suspension, not exceeding 10 days." 419 U.S. at 584. As noted by Justice Powell in his dissent, while "[t]he court speaks of 'exclusion from the educational process for more than a trivial period,' . . . its opinion makes clear that even one day's suspension invokes the constitutional procedure mandated today." *Id.* at 585 n.3 (Powell, J., dissenting) (citations omitted).

[15] According to the Court, if a student is to be subjected to a short term suspension of 10 days or less, due process demands that he

> be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The [due process] clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Id. at 581 (footnote omitted).

[16] 420 U.S. 308 (1975).

[17] More specifically, the *Strickland* Court ruled that within the context of the enforcement of school discipline

> a school board member is not immune from liability for damages . . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Id. at 321.

This Note will examine the new due process requirements for short term suspensions from public schools within the context of the evolving doctrine of entitlement.[18] The *Goss* expansion of the constitutional rights of students will then be discussed in relation to the *Strickland* extension of the personal liability of school officials who act in derogation of those rights. Some conclusory observations will be offered as to the impact of these decisions on day-to-day school operations and legal relationships.

Do Short Term Student Suspensions Require the Application of Due Process?

A number of state education statutes authorize a principal or an administrator to effect a short term suspension, but do not require these school officials to observe even minimal due process procedures prior to the imposition of such disciplinary action.[19] In passing upon the legitimacy of these suspensions, courts have displayed marked disagreement in their determinations of: (1) what constitutes a "short" suspension,[20] (2) whether any due process requirement should attach to the short suspension,[21] and (3) as-

[18] The doctrine of entitlement, as delineated in Board of Regents v. Roth, 408 U.S. 564 (1972), represents an expansion of the property rights protected by the due process clause. Under the entitlement doctrine, a benefit granted by a governmental entity to a class of individuals becomes the intangible *property* of all those entitled to the benefit. In *Roth*, the Court emphasized that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire . . . [or] unilateral expectation of it. He must, instead, have a legitimate *claim of entitlement* to it.

Id. at 577 (emphasis added). *See* text accompanying notes 52-53 *infra*.

[19] *See, e.g.*, Conn. Gen. Stat. Ann. § 10-233 (1973) (individual towns authorized to establish rules for suspension, but application of due process not required); 11 Mo. Ann. Stat. § 167.171 (Vernon 1959) (principals in urban districts specifically permitted to suspend students summarily for up to 10 days); N.C. Gen. Stat. §§ 115-147 (1975) (principal may suspend student without prior hearing, but suspension subject to superintendent's review); Ohio Rev. Code Ann. § 3313.66 (1972) (principals authorized to suspend student for up to 10 days without prior notice or hearing).

[20] Typically, courts have not explicitly treated "short suspensions" as a distinct category, but judicial examinations of due process claims have impliedly recognized such a classification in order to determine whether due process protection attaches. *See, e.g.*, Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) (suspension of three days or more merits due process); Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971) (due process attaches in suspension of more than 10 days); Jackson v. Hepinstall, 328 F. Supp. 1104 (N.D.N.Y. 1971) (no hearing needed for 5-day suspension); Dunn v. Tyler Indep. School Dist., 327 F. Supp. 528 (E.D. Tex. 1971), *rev'd in part*, 460 F.2d 137 (5th Cir. 1972) (no due process needed for 3-day suspension).

[21] In denying due process protection, courts generally have held that the challenged suspension did not constitute sufficient deprivation to warrant due process, rather than find that due process is unavailable in all suspension cases. *See, e.g.*, Linwood v. Board of Educ., 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972), wherein the court stated that

> a suspension for so relatively short a period [7 days] for reasonably proscribed conduct is a minor disciplinary penalty which the legislature may elect to treat

suming due process is necessary, precisely what will constitute due process in these circumstances.[22] In *Goss v. Lopez* the Supreme Court, in a five-to-four decision, answered all three questions with clarity, if not unanimity.[23]

Goss v. Lopez

Factual Background

Goss involved a demand for injunctive relief by nine Ohio public school students who received short suspensions for misconduct during a period of student unrest.[24] The students' suspensions were initiated pursuant to an Ohio statute that empowered a school principal to suspend a student for as many as 10 days without prior notice of the reasons for the suspension or a hearing to evaluate the validity of the charges.[25] The principal was only required to notify the students' parents of the reasons for the suspension within 24 hours of its imposition.[26]

The circumstances and alleged misconduct of the individual students in *Goss* varied considerably. Some of the students were disciplined for engaging in defiant or aggressive behavior in the presence of the principal who instituted the suspensions,[27] while

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differently from expulsion or prolonged suspension without violating a constitutional right of the student.

Id. at 768-69. *Contra*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (notice and hearing required prior to *any* suspension or expulsion); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972) (due process attaches to *all* suspensions regardless of the duration).

[22] Generally, courts have followed the rule enunciated in Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), that "the minimum procedural requirements necessary to satisfy due process should depend upon the circumstances and the interests of the parties involved." 294 F.2d at 155, *citing* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961). *See, e.g.*, Tate v. Board of Educ., 452 F.2d 975 (8th Cir. 1972) (due process required in short suspension consists of telling the student what he is accused of doing, revealing the evidentiary basis of the accusation, and giving him a chance to explain his version of the incident); Keller v. Fochs, 385 F. Supp. 262 (E.D. Wis. 1974) (student entitled to notice and opportunity to be heard, but names of all witnesses against him and copies of their testimony need not be furnished); Vail v. Board of Educ., 354 F. Supp. 592, 603 (D.N.H. 1973) (full evidentiary hearing required prior to a suspension of five days or more, while only "administrative consultation" required prior to suspension of a shorter duration).

[23] Justice White authored the majority opinion expressing the views of Justices Douglas, Brennan, Stewart, and Marshall. Justice Powell, joined by Chief Justice Burger and by Justices Blackmun and Rehnquist, wrote the dissent.

[24] 419 U.S. at 569.

[25] OHIO REV. CODE ANN. § 3313.66 (1972).

[26] *Id.*

[27] 419 U.S. at 569. Six of the named plaintiffs were suspended either for acting in direct defiance of the principal or for resisting police officers who, at the request of the principal, were attempting to disperse a demonstration being held in the school auditorium. All six students were given 10-day suspensions. One student received two additional 10-day suspensions for other violations, and another was transferred to a different school. *Id.* n.4.

others were suspended for disruptive actions not personally witnessed by the official who ordered the disciplinary sanction imposed.[28] In addition to seeking a judicial determination that the suspension statute unconstitutionally authorized school administrators to deprive plaintiffs of their right to an education without providing a hearing of any kind,[29] the students asked that all references to the suspension be expunged from their records and that school officials be enjoined from issuing further suspensions under the challenged statute.[30] A three-judge federal district court[31] held that the Ohio suspension statute was unconstitutional and ordered the school administrators to formulate new disciplinary procedures consonant with the requirements of due process.[32]

On appeal, the Supreme Court affirmed the district court's determination, ruling that the Ohio suspension statute deprived the students of their fourteenth amendment rights to procedural due process.[33] According to the *Goss* Court, due process requires that short suspensions be preceded by notice of the reasons for the disciplinary action accompanied by an informal hearing wherein the student may present his version of the incident.[34] Finally, the Court affirmed the district court's order that reference to the suspensions be removed from the students' records.[35] It is suggested that the significance of the decision lies in the Court's finding that students have a property right in their public school education which may not be abridged without due process.

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[28] One plaintiff was among 75 other students who were suspended following a disturbance in the school cafeteria. The student testified that he had been an innocent bystander, but that he had been afforded no opportunity to question the propriety of his suspension. Another student participated in a demonstration at a high school other than the one she attended. Before she was able to return to her own school, she received a letter informing her that she had been suspended. The Court found that the student's record, which did not disclose the source of the information on which the suspension was grounded, indicated that she had received no hearing. *Id.* at 570-71. The Court's concern with the unfortunate possibility of mistaken identity, which is present when students are, as here, suspended without a prior hearing, suggests that the particular facts of these two suspensions weighed heavily in its analysis and decision. *See id.* at 579-80.

[29] *Id.* at 569.

[30] *Id.*

[31] When an action is brought in a federal court to enjoin the enforcement of an allegedly unconstitutional state statute, an injunction may only be granted by a three-judge district court. 28 U.S.C. § 2281 (1970).

[32] 372 F. Supp. at 1279.

[33] The crucial passage of the fourteenth amendment provides: "No state shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[34] 419 U.S. at 581-84.

[35] *Id.* at 584.

A State-Created "Right" to Education

Education has been said to be one of the "most important" obligations of society;[36] nonetheless, the Supreme Court, in *San Antonio School District v. Rodriguez*,[37] held that no constitutionally guaranteed fundamental right to an education exists.[38] Although that ruling apparently suggests that suspended students are not entitled to due process safeguards,[39] it seems best understood in the limited context of equal protection of law and thus not dispositive of students' rights to due process.[40]

Unlike equal protection claims, the right to due process does not depend upon a finding of a fundamental right guaranteed by the Constitution.[41] At one time due process protections were held to apply to only a limited number of "rights," and these rights were distinguished from unprotected "privileges" such as public employment.[42] This distinction, however, has been supplanted by a more flexible mode of analysis.[43] Today, the right to due process

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[36] Brown v. Board of Educ., 347 U.S. 483 (1954).

> [E]ducation is perhaps the most important function of state and local governments . . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493; *accord*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

[37] 411 U.S. 1 (1973).

[38] In *Rodriguez*, the Court undertook its search for a fundamental constitutional right to education in order to establish the proper degree of judicial review for an equal protection claim. Since the Court found no fundamental right, it did not employ strict judicial scrutiny; instead, it required only that the challenged state statute be supported by a rational basis. Noting that education is "not among the rights afforded explicit protection" under the Constitution, the Court was also unable to find any "basis for saying it is implicitly so protected." *Id.* at 35. Although it reaffirmed the significance of education, the Court recognized that "the importance of a service performed by the state does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." *Id.* at 31.

[39] *See* Flygare, *supra* note 11, at 53. In *Goss*, the defendant administrators, relying upon *Rodriguez*, contended that due process could not protect the students because there is no constitutional right to a public education. 419 U.S. at 572.

[40] Equal protection and due process claims involve different analytical tests. An equal protection evaluation is initially concerned with the existence of a *fundamental right* guaranteed by the Constitution, *see* note 38 *supra*, while due process is dependent upon a finding of a *protected interest* that falls within the coverage of the fourteenth amendment. A court may find that a particular interest, though not a fundamental right, is protected by due process. *Compare* Dandridge v. Williams, 397 U.S. 471 (1970) (no fundamental constitutional right to welfare benefits for equal protection purposes) *with* Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipient has a protected interest in welfare benefits entitling him to due process).

[41] *See* Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

[42] *See* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951), wherein public employment was generally held to be a "privilege," not a "right," and hence procedural due process guarantees were held to be inapplicable.

[43] A number of cases have followed Graham v. Richardson, 403 U.S. 365, 374 (1971), which thoroughly rejected the rights-privileges distinction. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972); Perry v. Sinder-

requires only a protected interest "encompassed within the fourteenth amendment's protection of liberty and property."[44]

In a recent line of cases culminating with *Board of Regents v. Roth*,[45] the Supreme Court has discussed the expansive nature of the liberty and property rights that come within the fourteenth amendment's shield of due process.[46] As the Court explained in *Roth*, the critical threshold in any due process claim is the finding of a protected interest.[47] The proper method of determining the presence of such a protected interest is to evaluate the *nature*, rather than the *weight*, of the interest involved.[48] To illustrate this vital distinction, consider a hypothetical situation in which a state appropriates an individual's privately owned automobile. The *nature* of the individual's interest is represented by his property right in the automobile. The *weight* of his interest is represented by the amount of harm suffered by the individual in terms of the pecuniary loss or inconvenience caused by the state action. According to *Roth*, if an interest, by its nature, is protected, due process immediately attaches regardless of the weight of that interest.[49] To determine the specific degree of due process to be afforded, however, a court must then weigh the gravity of the deprivation likely to be suffered by the individual against the state's interest in taking its proposed action. Depending upon the balance struck, greater or lesser procedural formalities will be deemed proper.[50]

The first step for the *Goss* Court, therefore, was to determine whether the students had a protected interest in their education.[51]

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man, 408 U.S. 593 (1972). *See also* Van Alstyne, *The Demise of the Rights-Privileges Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[44] Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

[45] *Id.* at 564 (nontenured teacher who was not rehired had no property interest in continued employment sufficient to require due process protection).

[46] In *Roth*, the Court noted that:

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

Id. at 571, *quoting* National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

[47] The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When *protected interests* are implicated, the right to some kind of prior hearing is paramount.

408 U.S. at 569-70 (footnote omitted) (emphasis added).

[48] *Id.* at 570-71; Morrissey v. Brewer, 408 U.S. 471, 481 (1972), *citing* Fuentes v. Shevin, 407 U.S. 67 (1972). *See also* Flygare, *supra* note 11, at 533.

[49] 408 U.S. at 569-70.

[50] *Id.* at 570 n.8, *citing* Boddie v. Connecticut, 401 U.S. 371, 378 (1970).

[51] Goss v. Lopez, 419 U.S. 565, 573 (1975).

In *Roth* the Supreme Court noted that the most common source of constitutionally protected property interests is not the Constitution, but rather state statutes guaranteeing a benefit to a specified class of people.[52] Once the individual establishes himself as a member of such a class, he acquires a right or entitlement to that benefit which is safeguarded by due process.[53] Based upon this expansive definition of "property interests" in *Roth*, the *Goss* Court found that the suspended students did have a protected property interest in education.

As the source of the students' property interest in their education, the *Goss* majority pointed to the Ohio statute directing local authorities to provide free public education to all State residents between the ages of 6 and 21.[54] Additional reliance was placed upon a statutory provision mandating that school be attended by all such residents for a minimum of 32 weeks per year.[55] The Court reasoned that the State of Ohio had thus elected to bestow the right to an education upon all people within a particular age classification.[56] Though it was not obligated under the United States Constitution to establish a public school system, once the State chose to do so, it created a protected property interest within the *Roth* framework. The Court therefore held that Ohio could not terminate that right without providing fundamentally fair procedures to determine whether the alleged misconduct had indeed occurred.[57]

The Court also found that the suspension of the students in *Goss* amounted to an unconstitutional deprivation of their liberty, and, as such, was independently sufficient to necessitate due process protection. It was established in *Roth* that in addition to traditional aspects of liberty such as freedom from unlawful imprisonment, another protected interest in liberty is an individual's right to

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[52] Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577.

[53] *See, e.g.*, Wolf v. McDonnell, 418 U.S. 539 (1974) (prisoners possess a protected interest in statutorily accumulated credits for good time); Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring) (government employees whose employment is guaranteed in the absence of "cause" for dismissal possess a protected interest in their employment); Morrissey v. Brewer, 408 U.S. 471 (1972) (parolees have a protected interest in their parole status); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients, so long as they qualify for payments under the established statutory criteria, possess a protected interest in their benefits).

[54] 419 U.S. at 573, *citing* OHIO REV. CODE ANN. §§ 3313.48, .64 (1972).

[55] OHIO REV. CODE ANN. § 3321.04 (1972).

[56] 419 U.S. at 574.

[57] *Id.*

his "good name, reputation, honor, or integrity."[58] Under this approach, an individual is entitled to due process protection against any state action that would have the effect of damaging his reputation by creating a "stigma or badge of disgrace."[59] Noting that a suspension from school of any duration on grounds of misconduct became part of the student's permanent record, the *Goss* Court recognized that such "charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[60]

The Court acknowledged that the degree of harm inflicted upon the property and liberty interests of the students in *Goss* was slight. Nevertheless, it concluded that so long as the deprivations were not "de minimis,"[61] *i.e.,* wholly unsubstantial, at least minimal due process must be provided.[62] Though not unaware of the very broad authority of the State to maintain standards of conduct within its schools, the Court warned that the State is nevertheless

> constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[63]

The due process analysis of the majority was sharply criticized by Justice Powell, who argued that it had misconceived the nature of property rights as enunciated in *Roth.*[64] Conceding that the Ohio education statute had indeed created a protected interest in education, Justice Powell called the majority's attention to the language in *Roth* where the Court held that property interests "are created and their *dimensions are defined* by existing rules . . . such as state law."[65] Since the Ohio statute explicitly authorized a principal to

[58] 408 U.S. at 573, *citing* Wisconsin v. Constatineau, 400 U.S. 433, 437 (1971). In *Constatineau* the public "posting" without notice or hearing of the names of presumed alcoholics to whom liquor was not to be sold was held to constitute a deprivation of liberty. *See also* Flygare, *supra* note 11, at 535.

[59] Wisconsin v. Constatineau, 400 U.S. 433, 436 (1971).

[60] 419 U.S. at 575. The *Goss* Court relied in part upon evidence that, in admissions applications, many colleges routinely request information about suspensions. *Id.* The Court also observed that Congress had recently seen fit to limit access to information in files of students in federally funded schools. *Id.* n.7.

[61] The *Goss* Court borrowed the phrase "de minimis" from Justice Harlan's concurring opinion in Sniadich v. Family Fin. Corp., 395 U.S. 337, 342 (1969). For a discussion of Justice Powell's criticism of this application of the de minimus test, see note 79 *infra.*

[62] 419 U.S. at 574.

[63] *Id.*

[64] *Id.* at 586 (Powell, J., dissenting).

[65] *Id.* (emphasis in original), *quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

suspend a student for up to 10 days, the conclusion to be reached from a consideration of the entire statutory scheme governing education in Ohio, was, in Justice Powell's view, that the property interest granted by statute provided for free education *subject to* suspensions of up to 10 days.[66] Under this interpretation, the plaintiff students suffered no deprivation of their rights since the benefit was initially qualified.[67]

Entitlement and Due Process — Three Views

Since it strikes at the very heart of procedural due process and the doctrine of entitlement, the dispute between the majority and minority analyses is an important one. If a state chooses to bestow a benefit or interest upon a specific group of individuals, may it also unreservedly limit the right to that benefit without regard to due process requirements? The majority's answer to this question would seem to be in the negative. The Powell view, on the other hand, appears, at first glance, to support a state's unlimited authority to define, restrict, or withdraw the constitutionally protected interests that have been statutorily conferred. Powell's concurring opinion in a recent entitlement case, *Arnett v. Kennedy*,[68] suggests, however, that the Justice does not favor so severe an approach.

In *Arnett*, a civil servant[69] unsuccessfully challenged the constitutionality of his dismissal from employment[70] on the ground that the statutory termination mechanisms[71] did not meet the minimum requisites of due process.[72] Justice Powell relied upon the statutory entitlement analysis of *Roth* to argue that once the

[66] 419 U.S. at 586-87 (Powell, J., dissenting).

[67] Justice Powell suggested that the majority's error was its "posturing the case as if Ohio had conferred an unqualified right to education, thereby compelling the school authorities to conform to due process procedures in imposing the most routine discipline." *Id.* at 587 (footnote omitted). In addition, he did not believe that brief suspensions so seriously injured a student's reputation as to deprive him of his "liberty" and thus require due process. *Id.* at 589, *citing* Board of Regents v. Roth, 408 U.S. 564 (1972) (failure to rehire nontenured teacher did not cause sufficient damage to reputation to constitute a deprivation of liberty).

[68] 416 U.S. 134 (1974).

[69] Kennedy was a nonprobationary employee in the Office of Economic Opportunity (OEO) who was dismissed on charges of dishonesty for allegedly spreading false rumors about other OEO employees. *Id.* at 136-37.

[70] Kennedy's claim of entitlement to his employment was founded upon a statutory section which provided: "An individual in the competitive service may be removed or suspended without pay *only for such cause* as will promote the efficiency of the service." 5 U.S.C. § 7501(a) (1970) (emphasis added).

[71] The employment statute provided that upon dismissal the individual was entitled to written apprisal of the reasons for his dismissal, notice of the action and charges, an opportunity to file a written answer, and a written decision. *Id.* § 7501(b).

[72] The termination procedures failed to provide a hearing until *after* the employee had been dismissed. *Id.*

statute has conferred a constitutionally protected property interest, due process safeguards may not be summarily avoided.[73] Although the protected interest may have been a creation of the legislature, the right to due process, the Justice emphasized, is conferred "not by legislative grace, but by constitutional guarantee."[74]

Justice Powell's dissent in *Goss*,[75] which stressed the power of a state to define the dimensions of a statutorily conferred benefit, appears to contradict his earlier denial in *Arnett* of legislative authority to limit the due process protection of rights it had conferred. The apparent inconsistency may be resolved, however, by examining a footnote to the *Goss* dissent.[76] There, Powell emphasized that the statutory grant in *Arnett* explicitly guaranteed that there could be no dismissal from employment without a showing of "cause," whereas the Ohio education statute in *Goss* contained no equivalent qualification.[77] The Justice viewed this difference as an indication that the Ohio Legislature had not believed that a short suspension would subject a student to a grievous loss. Conversely, termination of employment, as in *Arnett*, and *expulsion* from school were treated by Justice Powell as grievous penalties sufficient to justify the judiciary's authority to set due process standards.[78] Taken together, Powell's opinions in *Goss* and *Arnett* suggest that he would demand strict adherence to the due process doctrine of entitlement only to guard against grievous deprivations of protected interests.[79]

In contrast to the approaches of Justice Powell and the *Goss* majority, Justice Rehnquist, in his plurality opinion in *Arnett*, did argue in favor of a state's power to designate the procedures by which a statutorily conferred benefit might be terminated. He took

[73] 416 U.S. at 166-67 (Powell, J., concurring).

[74] *Id.* at 167.

[75] 419 U.S. at 586-87 (Powell, J., dissenting).

[76] *Id.* at 587 n.4.

[77] *Id.*

[78] *See id.*

[79] Justice Powell argued that the majority's conclusion — that the *nature* of the interest is the threshold test for determining whether due process should attach — was founded upon cases which in fact involved a serious or grievous loss. *Id.* at 587-88. Among the cases cited by the Justice were Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parole revocation inflicts grievous loss); Bell v. Burson, 402 U.S. 535, 539 (1971) (license revocation affects important interests); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (access to courts to obtain a divorce deemed a significant interest); and Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (termination of welfare benefits imposes grievous loss).

The Justice further contended that the de minimis test applied by the *Goss* majority, *see* notes 61-62 and accompanying text *supra*, is irrelevant to entitlement cases since Sniadich v. Family Fin. Corp., 395 U.S. 337 (1969), from which the phrase was drawn, involved a property dispute between private parties, rather than property interests conferred by the state. 419 U.S. at 588 n.5.

the position that *Roth*'s acknowledgement of legislative power to "define" the dimensions of the right given meant that, in granting a property interest, the legislature could simultaneously design the procedural rules defining the limitations of that interest.[80] Viewing a substantive benefit as being "inextricably intertwined" with the limitations on procedural due process correspondingly placed upon the benefit, Rehnquist concluded that "a litigant . . . must take the bitter with the sweet."[81]

Thus, at least three distinctly different opinions have recently been expressed within the Court as to the proper evaluation and treatment of a legislature's attempt to limit the constitutionally protected interests it confers by statute. The *Goss* majority contended that when a state grants a benefit which amounts to a constitutionally protected interest, due process will automatically attach. If the state seeks to revoke or diminish the benefit to any significant extent,[82] the procedures employed must comport with the requirements of due process.

A conflicting view is represented by the Rehnquist opinion in *Arnett*. This view suggests that since the state created the right in the first instance, it should have the power to limit the due process required to withdraw that benefit.[83] Such an analysis would seem to apply without any reference to the degree of harm caused by impinging upon that interest since, the Justice reasoned, absent the statute the individual had nothing in the first place.[84] The Rehnquist view might be paraphrased to read "as the statute giveth, so the statute taketh away." Any evaluation of this position should

[80] 416 U.S. at 153. Justice Rehnquist was joined in his opinion by Justice Stewart and Chief Justice Burger. The majority of the Justices concluded that Kennedy had received adequate due process procedures, but disagreed with Rehnquist's interpretation of the doctrine of entitlement. Justice Powell, joined by Justice Blackmun, argued that the Constitution, and not the statute, determines which due process requirements attach to a statutory benefit, *see* text accompanying notes 73-74 *supra*, but concurred in the decision, reasoning that the procedures provided by the statute satisfied such constitutional requirements. *Id.* at 171 (Powell, J., concurring). Justice White also argued that the Constitution, and not the statute, defines the requisites of due process. He believed, however, that the statutory procedures were constitutionally defective for their failure to guarantee an impartial hearing officer. *Id.* at 203 (White, J., concurring in part and dissenting in part). Justice Marshall, joined by Justices Brennan and Douglas, dissented on the ground that a full evidentiary hearing was constitutionally required before the employee could be discharged. *Id.* at 226-27 (Marshall, J., dissenting). Thus, six Justices (Powell, Blackmum, White, Marshall, Brennan, and Douglas) agreed that once a state confers a property interest, the Constitution, not the statute, defines the due process necessary to deprive the individual of that right. *See id.* at 185 (White, J., concurring in part and dissenting in part).

[81] *Id.* at 154.

[82] The *Goss* Court stated that due process would protect any deprivation of a protected interest that was not de minimis. *See* notes 61-62 and accompanying text *supra*.

[83] *See* notes 80-81 and accompanying text *supra*.

[84] 416 U.S. at 153.

recognize that the doctrine of entitlement was, in part, developed to replace the old wooden distinction between rights and privileges.[85] The view of entitlement espoused by Justice Rehnquist would give the states a free reign to limit by statute the procedural safeguards accompanying benefits that formerly were called "privileges," while full due process protection would still be afforded individuals whose constitutionally guaranteed "rights" were threatened. Hence, the Rehnquist view would seem inevitably to lead back to a resuscitation of the rights-privileges distinction.[86]

The somewhat more elusive view of Justice Powell seems to rest upon the use of a weighing process as the first step in finding a protected interest. The weighing test would not permit a legislature to abandon or limit due process safeguards where the withdrawal of a benefit would inflict grievous harm upon the individual. If the removal of the benefit would not cause severe injury, however, Justice Powell would be more permissive in allowing the legislature to fashion the due process attendant upon the interest. As opposed to the *Goss* majority, which, it should be recalled, concentrated upon the nature of the interest, requiring only that the loss not be de minimis,[87] Justice Powell, in his dissent, called for an initial determination of whether the weight of the threatened deprivation assumes constitutional dimensions.[88] The Powell position's greatest strength lies in the fact that it would prevent federal judicial intervention into state decisions unless individuals are being seriously harmed. The most notable weakness in the Powell approach lies in

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[85] *See* notes 42-43 and accompanying text *supra*.

[86] Indeed, Justice Marshall has already cautioned that acceptance of the Rehnquist view would revive the rights-privileges approach to due process:

> A majority of the Court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it could be conditioned on a statutory limitation of procedural due process protections, an approach which would render such protection inapplicable to the deprivation of any statutory benefit — any "privilege" extended by Government — where a statute prescribed a termination procedure, no matter how arbitrary or unfair. It would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process.

Arnett v. Kennedy, 416 U.S. 134, 211 (1974) (Marshall, J., dissenting).

For a different interpretation of the Rehnquist view see *The Supreme Court 1973 Term*, 88 HARV. L. REV. 83, 86-88 (1974). The theory presented is that the very concept of entitlement is "illusory" because legislatures may draft statutes in such a way as to incorporate procedural limits into the substantive guarantee itself. The legislature could "thus adopt substantive restrictions which have the effect of limiting procedural rights." *Id.* at 87.

[87] *See* notes 47-53 & 61-62 *supra*.

[88] Contrary to the Court's assertion, our cases support, rather than "refute" appellants' argument that the due process clause comes into play *only* when the state subjects a student to a "severe detriment or grievous loss."

419 U.S. at 587-88 (Powell, J., dissenting) (emphasis added).

its inherent lack of predictability. A state legislature would pass statutes without any more guidance than its best guess as to what sort of deprivation a court might subsequently consider grievous.

The *Goss* majority recognized that precedent[89] supports the use of the two-part analytical scheme pursuant to which a finding based on the nature of an interest will trigger the right to due process, subject only to the easily met de minimis threshold test. Once the protected interest is established, the court will examine the weight of the benefit and the grievousness of the hardship in order to determine the proper degree of due process required within the specific context. A major value of the majority's approach is that it takes full advantage of the enormous flexibility of due process itself.[90] At one end of the due process spectrum lie the strict evidentiary rules and technical procedures designed to protect vigilantly the liberty of the defendant in a criminal trial. At the opposite end are the bare requirements of prior notification and an informal hearing to prevent an unfair, but less damaging, deprivation of a protected interest.

The Powell approach, in its dependence upon grievous harm, would necessarily result in the implementation of only the more demanding facets of due process. Failing to apply due process to less severe infringements of protected interests, this view would render minimal levels of due process dormant in the area of statutory entitlements. In contrast, the *Goss* approach would better utilize the broad range of due process procedures. If the deprivation to be suffered by the individual is less than grievous, the minimal due process procedures would apply. If the deprivation reaches grievous proportions, more formal aspects of due process would be in order.

By requiring a minimum degree of due process for short suspensions, the *Goss* Court appears to have struck a proper balance between the interests of the student and the school. A student's main interest in the face of a suspension is to avoid exclusion from the educational process due to unfairness or mistake.[91] The institution's paramount interest is the orderly operation of the school for

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[89] *See, e.g.*, Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Fuentes v. Shevin, 407 U.S. 69 (1972). In *Fuentes* the Court noted that length and severity of deprivation, while significant factors, are "not decisive of the basic right to a prior hearing of some kind." *Id.* at 86.

[90] *See* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), wherein the Court stated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 895.

[91] *See* Goss v. Lopez, 419 U.S. 565, 579 (1975).

the benefit of all students. This requires the ability to act swiftly and expeditiously to remove a disruptive student before he has an opportunity to instigate further difficulties.

The *Goss* decision to require that a student receive prior notice of the reason for the proposed suspension, an explanation of the evidence against him, as well as an opportunity to present his side of the story,[92] provides a substantial shield against overt injustices such as mistaken identity. At the same time, the procedures are not so formal, technical, or time consuming as to create an undue burden upon the school administration. Indeed, the standard of notice and hearing demanded by the Court is less stringent than that normally practiced in a great many school systems.[93] Moreover, specific provisions have been made to ensure prompt action in what the Court referred to as an "emergency situation," where the immediate presence of the student represents a continuing threat to persons or property or a potential disruption of the academic process.[94] In such an emergency the requirements of prior notice and hearing need not be met, and the student may be immediately removed from the school.

In his dissent, Justice Powell expressed his concern with what he considered to be an improper reliance upon the judiciary in an ordinary dispute between schools and students.[95] It must be emphasized, however, that the judicial imposition of due process requirements gives the individual no more formal procedures than the state should have sought to provide in the first place.[96] Due

[92] *Id.* at 581. One of the most fundamental requirements of due process is that notice and hearing precede the imposition of any deprivation. *See, e.g.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), wherein the Court stated that while the words of the due process clause have been a subject of controversy, "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing . . . ." *Id.* at 313. *See also* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168-69 (1951) (Frankfurter, J., concurring).

[93] Several of the schools involved in *Goss* espoused policies for suspension which provided procedural safeguards equal to, or in excess of, those required by the Court. 419 U.S. at 583.

[94] *Id.* at 582-83.

[95] *Id.* at 589-600 (Powell, J., dissenting). Justice Powell expressed dismay at the potential ramifications of the majority's holding:

> One can only speculate as to the extent to which public education will be disrupted by giving every schoolchild the power to contest *in court* any decision . . . which arguably infringes the state-conferred right to education.

Id. at 600 n.22 (emphasis in original).

[96] *See generally* Endicott v. Van Petten, 330 F. Supp. 878 (D.C. Kan. 1971), wherein the court, chiding defendant school administrators, questioned

> the reluctance of the defendants, an arm of the state, to provide fundamental fairness to those persons with whom they deal in an area so vital as public education, for it is only fundamental fairness that is required by the Constitution.

Id. at 885.

process does not place unreasonable demands upon the state; nor does it prevent the state from taking necessary action. It merely provides assurance that the individual whose interests are in jeopardy has been treated fairly.[97]

Finally, the *Goss* approach to due process affords a high level of predictability. As a result of *Goss*, a legislature should be fully aware that if a statute confers benefits upon groups of people, and if such benefits constitute protected interests, it should also provide fair and reasonable safeguards against arbitrary or mistaken withdrawal of those benefits. If the statute fails to do so, the federal judiciary may impose due process procedures upon the state.

SCHOOL ADMINISTRATORS' LIABILITY IN SECTION 1983 ACTIONS

Viewed from the perspective of the school administrator, the *Goss* decision provides specific guidelines for the imposition of a minimal suspension only. Whether more serious forms of separation from the school will require added due process protections remains an unsettled issue,[98] but at least *Goss* supplies the administrator with a general model according to which he may monitor his behavior. The availability of such a model is particularly important in light of the school official's potential personal liability, under section 1983 of the Civil Rights Act,[99] for infringing upon a student's constitutional rights.

Until recently, even the threat of this liability did not pose a significant check upon the administrator's freedom of action, since a number of unsettled issues limited the remedial utility of section 1983.[100] A major source of confusion was the apparent contradic-

[97] *See generally* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168-69 (Frankfurter, J., concurring), wherein it is noted that decisions made in secrecy can never be conducive to finding the truth and that the individual in jeopardy need be given notice of the case against him and an opportunity to be heard.

[98] The *Goss* Court admitted that longer suspensions or expulsions "*may* require more formal procedures." 419 U.S. at 584 (emphasis added).

[99] 42 U.S.C. § 1983 (1970). Section 1983, which is derived from the Civil Rights Act of 1871, Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, is the general vehicle by which an individual may bring a civil suit against any person who, through the exercise of state governmental authority, has infringed upon the constitutional rights of the plaintiff. The section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

[100] Persistent problems have been caused by § 1983's restricted application to "persons" acting under state law. *See* note 99 *supra*. In Monroe v. Pape, 365 U.S. 167, 187-92 (1961), it

tion between section 1983, which was created to permit a civil suit against a state governmental official, and the common law principle of sovereign immunity.[101] Under common law, public officials were protected from civil suit in order to facilitate forthright decision-making.[102] Despite early suggestions that the creation of section

was established that a municipality was not a "person" for the purposes of the predecessor of § 1983. Thus, municipalities could not be held liable for unconstitutional actions taken by their officers, even though these officers were personally liable under § 1983. The immunity of municipalities was later held to protect state governments as well. Williford v. California, 352 F.2d 474, 496 (9th Cir. 1965). Consistent with the eleventh amendment of the Federal Constitution, which grants the states immunity from suit in the federal courts, *Monroe* achieved some success in smoothing the waters. A number of subsequent decisions, however, have suggested that *Monroe* was decided on the basis of policy considerations and hence need not be applied to all governmental entities in all situations as a shield against a § 1983 action. *See, e.g.*, Harkless v. Sweeny Indep. School Dist., 427 F.2d 319 (5th Cir. 1970); Wall v. Stanly County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967); Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966). *See also* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1210 (1971). Prospective litigants seeking to employ § 1983 must note that a suit against the state may not be disguised as an action against an individual officer. The eleventh amendment "bars suits not only against the State when it is the named party but also when it is the party in fact." Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); *accord*, Edelman v. Jordan, 415 U.S. 651, 677 (1974). *See also* Note, *Damages Under § 1983: The School Context*, 46 IND. L.J. 521 (1971).

A further problem was the specific relief available against an individual officer under § 1983. *Ex parte* Young, 209 U.S. 123, 159-60 (1908), clearly established that a state official who had deprived another of a federal right was stripped of the state's eleventh amendment protection and would be "subjected in his person to consequences of his individual conduct." *Young*, however, involved only the injunctive power of the courts over an official: the availability of compensatory damages has been only recently confronted. *See* Scheuer v. Rhodes, 416 U.S. 232, 238 (1974) ("damages against individual defendants are a permissible remedy in some circumstances"); Moor v. County of Alameda, 411 U.S. 693 (1973) (availability of compensatory damages recognized); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (compensatory damages could lie for any violation of constitutional rights).

Since § 1983 has been deemed a "supplementary" federal cause of action, Monroe v. Pape, 365 U.S. 167 (1961), a number of procedural controversies have developed. For example, difficult issues of res judicata between the state and federal courts have been raised. *See generally* H. FRIENDLY, FEDERAL JURISDICTION 75 (1973); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1 (1974).

[101] For a comprehensive discussion of the legal and historical development of the concept of sovereign immunity and its adoption into the American legal system, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[102] Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963). As noted by the Supreme Court, "The concept of immunity assumes [that officials may err] and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Scheuer v. Rhodes, 416 U.S. 232, 242 (1974). In Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), Judge Learned Hand put forth his oft quoted argument that it is a pragmatic necessity for administrative officials to have *absolute* immunity:

> [A]n official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most

1983 had abrogated common law immunity, the Supreme Court has held that officials of the legislative and judicial branches of government still enjoy absolute immunity when acting within the scope of their duties.[103] Officials within the executive branch, however, have been held to possess only a qualified immunity.[104] The particular limits upon the immunity of an executive official thus became the focal point of section 1983 suits, and the delineation of these limits became an important and difficult problem for the courts.

Wood v. Strickland

Qualified Immunity for School Officials

In *Wood v. Strickland*[105] the Supreme Court turned its attention to the specific scope of immunity available to a school administrator whose actions violate a student's constitutional rights.[106] By its holding in *Strickland* that the administrator's immunity from suit may be overcome by a showing of either malice or unreasonable disregard of settled constitutional rights,[107] the Supreme Court has put sharp teeth into the section 1983 remedy.

Like *Goss, Strickland* involved the propriety of school disciplinary procedures[108] — the *Strickland* plaintiffs, however, had been

> irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.

Id. at 581.

[103] In Tenney v. Brandhove, 341 U.S. 367 (1951), the Court determined that the Congress, in enacting § 1983, had not intended to destroy the traditional immunity afforded the legislative branch and that such immunity was absolute. In Pierson v. Ray, 386 U.S. 547, 554 (1967), the Court held that absolute immunity also existed to protect the judicial branch of government and was reasonably and traditionally beyond the reach of the legislature.

[104] *E.g.*, Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (policemen enjoy a qualified immunity dependent upon good faith and probable cause for their actions). *See also* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943).

[105] 420 U.S. 308 (1975), *vacating and remanding* Strickland v. Inlow, 485 F.2d 186 (8th Cir. 1973), *remanding* 348 F. Supp. 244 (W.D. Ark. 1972).

[106] For a discussion of students' constitutional rights, see note 7 *supra.*

[107] 420 U.S. at 322.

[108] The facts of the *Strickland* case suggest that the entire incident arose from an innocuous, though ill-advised, prank. The two plaintiffs decided to enliven a parent-student school function by "spiking" punch with alcohol. The girls mixed two small bottles of malt liquor into a large quantity of soft drink, making a mildly alcoholic beverage. Though the punch was served at the meeting with no visible effect, news of the prank spread throughout the school and eventually reached both the teacher who had been in charge of the extracurricular activity and the school principal. The principal suspended the students for a maximum of two weeks and reported the occurrence at a school board meeting that evening. The girls were informed of the meeting, but neither they nor their parents were permitted to attend. The board voted to expel the offending students for the remainder of the

subjected to the more serious penalty of expulsion.[109] Alleging that such expulsion had been imposed in the absence of procedural due process, the students sought compensatory and punitive damages from members of the school board, two school administrators,[110] and the Special School District of Mena, Arkansas.[111] In addition, reinstatement, injunctive protection from any further sanctions, and expunction of the incident from the school records were requested.[112]

The district court held that a judgment in favor of the plaintiffs was dependent upon a determination that the board members had acted with "malice," which it defined as "ill will against a person — a wrongful act done intentionally without just cause or excuse."[113] The Court of Appeals for the Eighth Circuit remanded.[114] Criticizing the district court's "erroneous view of the law," the court of appeals held that in order to hold the defendants liable, "[i]t need only be established that the defendants did not, in the light of all the circumstances, act in good faith."[115] Although all the cases cited by both the district court and the court of appeals applied the phrase "good faith,"[116] the district court employed a subjective test of good faith, speaking in terms of the similar, but

semester, approximately three months. The pupils, accompanied by their parents and counsel, were permitted to appeal the board's decision two weeks after the expulsion was instituted. While they admitted their violation of the school rule forbidding alcoholic beverages on campus, the students maintained that their conduct did not warrant so severe a penalty. The board, voting not to alter its policy, upheld the expulsions. *Id.* at 311-13.

[109] The *Strickland* plaintiffs were expelled for the remainder of the semester. The students had to take a correspondence course as well as an additional course after graduation in order to graduate with their class. *Id.* at 313 n.5.

[110] The court of appeals affirmed the district court's directed verdicts in favor of the two school administrators, reasoning that there was no evidence that they had participated in the decision to expel the plaintiffs. 485 F.2d at 191. Since the plaintiffs did not appeal these verdicts, the administrators' liability was not considered by the Supreme Court. 420 U.S. at 309 n.1.

[111] The district court, looking to the protection afforded by the eleventh amendment, found the school district immune from liability. 348 F. Supp. at 244. The court reached this determination by relying on the interpretation given § 1983 in Monroe v. Pape, 365 U.S. 167 (1961), which held that a municipality (and impliedly other governmental entities) is not a "person" subject to a § 1983 action. Since the plaintiffs did not appeal this aspect of the decision, the school district was not a party before the Supreme Court. 420 U.S. at 309 n.1.

[112] 420 U.S. at 309.

[113] 348 F. Supp. at 248.

[114] 485 F.2d at 186.

[115] *Id.* at 191.

[116] *See, e.g.*, McLaughlin v. Tilendis, 398 F.2d 287, 291 (7th Cir. 1968) (school board members said to be immune if their decision was made in good faith and was based upon "justifiable grounds"); McDonough v. Kelly, 329 F. Supp. 144, 151 (D.N.H. 1971) ("even though the dismissal was . . . violative of due process, it was done in good faith."); Gouge v. Joint School Dist., 310 F. Supp. 984 (W.D. Wis. 1970) (in § 1983 action against school board for wrongful dismissal of teacher, defendants protected by qualified immunity based upon good faith).

not identical, concept of malice,[117] while the court of appeals held that "[t]he test is an objective, rather than a subjective, one."[118] Assuming good faith is the correct standard, the key issue becomes whether it ought to be evaluated subjectively,[119] objectively,[120] or as containing both subjective and objective elements.[121]

The Supreme Court thoroughly analyzed the competing factors. In developing for administrators a qualified immunity from section 1983 claims, both the protection of an official from liability for good faith mistakes and the preservation of a vital remedy to protect a citizen from deprivation of his constitutional rights were considered.[122] The goal of a properly formulated qualified immunity is, according to the Court, to permit the administrator to make

[117] 348 F. Supp. at 248. Although the court instructed the jury that the good faith of the defendants was a complete defense, the charge ultimately made was that the judgment of school directors is not open to question unless malice is shown and that there could be no liability for damages unless the "defendant's action, was the result of 'malice' toward the plaintiffs . . . ." *Id.* at 250. The court further stated that "so long as the exercise of independent judgment is free of 'malice' and/or is an action in good faith, there can be no action for damages." *Id.*

[118] 485 F.2d at 191.

[119] The subjective good faith test was succinctly delineated in Cobb v. Malden, 202 F.2d 701 (1st Cir. 1953), wherein Chief Judge Magruder stated that officials in the executive branch of government do not have absolute immunity, but rather possess

> a qualified privilege, giving them a defense against civil liability, for harms caused by acts done by them in good faith in performance of their official duty *as they understood it.*

Id. at 707 (Magruder, J., concurring) (emphasis added).

A number of courts have employed similar subjective evaluations of official behavior. *See, e.g.*, Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969); Wood v. Goodman, 381 F. Supp. 413 (D. Mass. 1974); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971), *rev'd on other grounds*, 408 U.S. 564 (1972); Bradford v. School Dist., 244 F. Supp. 768 (E.D.S.C. 1965), *aff'd*, 364 F.2d 185 (4th Cir. 1966).

[120] In Pierson v. Ray, 386 U.S. 547, 557 (1967), the Supreme Court implemented an objective standard of review for determining the availability of the qualified immunity defense in a § 1983 action against police officers. The Court held that the defense of "good faith and probable cause" would protect police officers from suits for false arrest. Subsequent cases have similarly evaluated the good faith immunity of school officials by specifically examining the circumstances surrounding a dispute. *See, e.g.*, Smith v. Losee, 485 F.2d 334, 344 (10th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 908 (1974) (good and valid reason for the decision required); McLaughlin v. Tilendis, 398 F.2d 287, 291 (7th Cir. 1968) (justifiable grounds for the action required).

[121] Wood v. Strickland, 420 U.S. 308, 321 (1975). *See* text accompanying notes 124-25 *infra*. *See also* Comment, *The Defense of "Good Faith" Under Section 1983*, 1971 WASH. U.L.Q. 666.

[122] 420 U.S. at 319-20. *See generally* Scheuer v. Rhodes, 416 U.S. 232 (1974); Barr v. Matteo, 360 U.S. 564, 569 (1959); Spalding v. Vilas, 161 U.S. 483, 498 (1896); Norton v. McShane, 332 F.2d 855, 857 (5th Cir. 1964); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 221-22 (1963); Nahmad, *Section 1983 and the "Background" of Tort Immunity*, 50 IND. L.J. 5, 30 (1972); Comment, *Civil Liability of Subordinate State Officials Under the Civil Rights Act and the Doctrine of Official Immunity*, 44 CAL. L. REV. 887 (1956); Note, *The Doctrine of Official Immunity Under the Civil Rights Acts*, 68 HARV. L. REV. 1229, 1232 (1955).

mistakes in order to encourage effective official action, while simultaneously preventing abuse of that protection.[123]

The Court achieved what it believed to be the proper balance between the interests of a school administrator and a student who claims a violation of his rights by holding that:

> A school board member is not immune from liability for damages under § 1983 if he knew or *reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[124]

Objective and Subjective Good Faith Required

The Court enumerated several factors, any one of which, it held, will constitute a lack of good faith sufficient to hold a school administrator liable for damages under section 1983. The subjective components of the good faith test, which call for an examination of an official's motives, impose liability for actions taken either in *knowing* disregard of the student's rights or with *malicious* intent to cause harm. Under the objective component of the test, a school administrator will lose his immunity if it is found that he "reasonably should have known" that he was violating a student's constitutional rights, regardless of his lack of actual knowledge. In this regard, the Court reasoned that

> an act violating a student's constitutional rights *can be no more justified by ignorance* or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives *than by the presence of actual malice.*[125]

Justice Powell, joined by Chief Justice Burger and Justices Blackmun and Rehnquist,[126] agreed with the majority's overall disposition of the case,[127] but in partial dissent strongly criticized

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[123] 420 U.S. at 319-20.

[124] *Id.* at 322 (emphasis added).

[125] *Id.* at 321 (emphasis added).

[126] *Id.* at 327 (Powell, J., concurring in part and dissenting in part). The same four Justices dissented in both *Strickland* and *Goss*, signaling a strong division within the Court on legal issues dealing with the public schools. The slim margin held by the majority in both cases suggests that school law will remain on precarious ground for some time to come.

[127] The Supreme Court vacated the court of appeals' finding that there was no evidence of the plaintiff students' violation of the school rule for which they had been expelled. The court of appeals had based its decision on the fact that the school regulation prohibited "intoxicating beverages," reasoning that the "spiked" punch made by the students contained too little alcohol to be legally considered an intoxicating beverage. 485 F.2d at 189-91. The

the majority's imposition upon public school officials of a "higher standard of care . . . than that heretofore required of any other official."[128] More specifically, the dissent charged that by requiring knowledge of "settled and indisputable law," the majority opinion equated ignorance with actual malice, thereby imposing liability for good faith mistakes.[129]

In support of its position, the dissent pointed to the Court's recent decision in *Scheuer v. Rhodes*.[130] In *Scheuer*, a section 1983 action was brought against the Governor of Ohio and officials and members of the Ohio National Guard for the 1970 killing and wounding of student protesters at Kent State University. In defining the standard for determining the applicability of qualified immunity, the *Scheuer* Court stated:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[131]

Justice Powell argued that *Scheuer* placed less limitation on an official's qualified immunity than did *Strickland*.[132]

Upon closer examination, however, it may be seen that the standards of care required by both the *Strickland* and *Scheuer* tests are essentially the same. Each contains objective as well as subjective components. In effect, "good faith belief," the subjective aspect of the *Scheuer* test, is very similar to "malicious intention" and knowing disregard of rights, the subjective components of the *Strickland* formula. In either case, an official's immunity may be destroyed by a showing of subjective bad faith alone.

The other aspect of the *Scheuer* test, "reasonable grounds for the belief formed at the time and in light of all the circumstances,"[133] is clearly objective in nature, since it permits the trier of fact to make an independent evaluation of the prevailing conditions and the reasonableness of the official's response to the

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Supreme Court noted that there was evidence that the students did bring alcoholic beverages onto school grounds and that it was improper to relitigate in federal court "evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." 420 U.S. at 326.

[128] 420 U.S. at 327.

[129] *Id.* at 321.

[130] 416 U.S. 232 (1974), *rev'g* Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972).

[131] *Id.* at 247-48, *quoted in* Wood v. Strickland, 420 U.S. 308, 330 (1975) (Powell, J., concurring in part and dissenting in part).

[132] 420 U.S. at 330-31.

[133] 416 U.S. at 247-48.

situation. This objective assessment necessarily requires that the defendant official be held responsible for knowledge of factors which he "reasonably should have known" — the very same evaluation of the defendant's conduct required by *Strickland*. Thus, under either test, a defendant's claim of ignorance will no longer afford him complete protection.

Admittedly, by requiring that a school official have knowledge of a student's basic unquestioned constitutional rights, *Strickland* imposes a specific standard of care, whereas *Scheuer* does not particularize the elements of knowledge to be inferred. It is suggested that this lack of particularization, however, stems from the procedural posture of *Scheuer* before the Supreme Court. In *Scheuer*, plaintiffs appealed a dismissal of their cause of action for lack of subject matter jurisdiction. The dismissal was based upon the defendants' immunity from suit under common law and the eleventh amendment.[134] Without the benefit of a full factual determination, *Scheuer* necessarily dealt with the issue of immunity in the abstract. *Strickland*, on the other hand, reached the Court following a full trial, and the decision drew upon all of the facts that had been presented.[135]

It is also noteworthy that in *Scheuer* the Court was not attempting to define specific standards of immunity for a single administrator or for a narrow class of officials. The defendants in *Scheuer* ranged in authority from one who was the Governor of Ohio to others who were merely enlisted personnel in the National Guard.[136] It is axiomatic of immunity principles that the scope of the protection expands in relation to the "scope of discretion and responsibilities of the office"[137] as well as the particular circumstances at the time of the action. Hence, it would be practically impossible to articulate a specific standard of care universally applicable to officials of any rank within the executive branch of government.[138] *Scheuer*, therefore, required the enunciation of a

[134] 471 F.2d at 43.

[135] 420 U.S. at 314.

[136] The defendants included "the Governor [of Ohio], the Adjutant General, and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the president of Kent State University." 416 U.S. at 233.

[137] Scheuer v. Rhodes, 416 U.S. 232, 247 (1974). In Barr v. Matteo, 360 U.S. 564 (1959), the Court noted that the immunity of the head of an executive department is wider in scope than is the immunity protecting an officer with less sweeping duties because "the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails." *Id.* at 573. *Accord*, Doe v. McMillan, 412 U.S. 306 (1973); Wheeldin v. Wheeler, 373 U.S. 647 (1963); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 908 (1974).

[138] *See generally* 24 CATH. U.L. REV. 164, 173 (1974).

general standard for determining the applicability of qualified immunity. *Strickland*, on the other hand, involved a limited class of defendants, *viz*, school board members, whose duties in relation to school discipline could be more easily ascertained and defined.[139]

It is submitted, therefore, that the *Strickland* standard of good faith qualified immunity is no more "harsh" than that of *Scheuer*, but is merely a particularization of the general guidelines previously established by the Court, such particularization arising out of the procedural posture of the case and the class of named defendants involved.

The Impact of Strickland *On School Officials*

The *Strickland* decision now requires school officials to be aware of the settled and indisputable constitutional rights of students. An official who deliberately disregards or claims ignorance of such rights will forfeit the qualified immunity which protects him from liability under section 1983. Justice Powell and the other dissenting Justices argued that it is too demanding to impose such a standard upon individuals who have voluntarily accepted responsibility for the direction of public education.[140] Mindful of the "hazard of even informed prophesy as to what are 'unquestioned constitutional rights,' "[141] the dissent observed that lay school officials certainly possess no "unique competency in divining the law."[142] The Court's five-to-four decision in *Goss v. Lopez* was cited as an example of the type of ruling that would not have been predicted by many constitutional scholars, let alone school board members.[143]

The dissent's concern with a school official's potential liability for decisions made in ignorance appears somewhat exaggerated. Since ignorance of only "*settled*, indisputable law"[144] will cause a school official to lose the protection of qualified immunity, the *Strickland* decision requires a school administrator to be neither

[139] The *Strickland* Court limited its holding to "the specific context of school discipline." 420 U.S. at 322. The *Strickland* standard for determining whether qualified immunity is available was applied to nonschool situations, however, in O'Connor v. Donaldson, 43 U.S.L.W. 4929 (U.S. June 26, 1975) (administrators of a state mental hospital), and Knell v. Bensinger, No. 74-1803 (7th Cir., Sept. 26, 1975) (administrator of a state correctional institution). Notably, both cases, like *Strickland*, involved a specific category of administrative officials whose responsibilities and duties were directed toward a narrow class of individuals.

[140] 420 U.S. at 331 (Powell, J., concurring in part and dissenting in part).

[141] *Id.* at 329.

[142] *Id.* at 331.

[143] *Id.* at 329.

[144] *Id.* at 321 (emphasis added). *See* text accompanying note 125 *supra*.

seer nor prophet.[145] The legal issues presented in *Goss* were obviously disputed and unsettled prior to the Court's decision. Now that they have been decided, the *Strickland* holding, it must be admitted, does demand that public school officials become familiar with the essential requirements of *Goss* and administer their duties accordingly. In sum, absent a genuine threat to the order or safety of the school,[146] an official seeking to suspend a student must afford him prior notice of the reason for the suspension and an opportunity to present his version of the incident.[147] It is submitted, however, that this illustration of the implications of *Strickland* demonstrates that the Court is imposing no more than a reasonable standard of constitutional awareness upon public school officials who have access to numerous texts specifically designed for the purpose of explaining legal trends and developments to educators.[148]

There have been allegations, most notably from civil libertarian groups,[149] that some school officials and even entire school systems systematically act in conscious disregard of the constitutional rights of students. More particularly, it has been suggested that disciplinary penalties such as emergency suspensions are frequently used to enforce minor regulations or to exclude students who are deemed undesirable.[150] It has further been claimed that internal controls upon school administrators are wholly ineffectual and that some school officials habitually violate students' constitutional rights due to such administrative acquiescence as well as the

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[145] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (officer not charged with responsibility of predicting possible changes in the law).

[146] *See* text accompanying note 94 *supra.*

[147] *See* text accompanying note 34 *supra.*

[148] *See, e.g.*, H. BUTLER, K. MORAN & F. VANDERPOOL, LEGAL ASPECTS OF STUDENTS' RECORDS (1972); LEGAL PROBLEMS OF SCHOOL BOARDS (A. Rozny ed. 1966); L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION (1973); NOLTE, *supra* note 1; M. NOLTE, GUIDE TO SCHOOL LAW (1969); M. NOLTE, SCHOOL LAW IN ACTION: 101 KEY DECISIONS WITH GUIDELINES FOR SCHOOL ADMINISTRATORS (1971); L. PETERSON, R. ROSSMILLER, & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION (1968); E. REUTER, THE COURTS AND STUDENT CONDUCT (1975); SCHOOLING AND THE RIGHTS OF CHILDREN (V. Hanbrich & M. Apple ed. 1975).

[149] *See* A. LEVINE, THE RIGHTS OF STUDENTS (1973), prepared for the New York Civil Liberties Union.

[150] Glasser & Levine, *Bringing Student Rights to New York City's School System*, 1 J.L. & EDUC. 213 (1972) [hereinafter cited as Glasser & Levine]. In a report issued by the Children's Defense Fund, the virtual abolition of suspensions as a disciplinary instrumentality was called for. Contending that 97% of all suspensions each year are not instituted for violent or dangerous offenses, the organization maintained that the principles enunciated by *Goss* and *Strickland* are still being widely disregarded in the nation's schools. Finally, it was suggested that increased counseling and special education could better benefit schools and students than could the use of suspensions. *See* CHILDREN'S DEFENSE FUND, WASHINGTON RESEARCH PROJECT INC., SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 79-106 (1975).

lack of effective legal sanctions.[151] Assuming such abuses are taking place, the *Strickland* decision provides the mistreated student with a significant remedy.[152]

CONCLUSION

The Supreme Court, in *Goss v. Lopez*[153] and *Wood v. Strickland*,[154] has expanded the rights of students and the responsibilities of school officials. As a result of *Goss*, students are now entitled to minimal due process proceedings before being suspended from school. *Strickland* puts school officials on notice that they may be personally liable if they disregard the established constitutional rights of their students. These rulings do not necessarily represent a new federal intrusion into the traditionally local domain of public education.[155] Rather, they may be said to reaffirm the notion that the rights guaranteed all Americans by our Constitution belong to citizens of every age group.[156] To deny students proper protection under the Constitution would foster cynicism and a lack of respect for the rule of law.[157] As the Supreme Court has noted:

> That schools are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to . . . teach youth to discount important principles of our government as mere platitudes.[158]

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[151] Glasser & Levine, *supra* note 150, at 224-29.

[152] Pursuant to the *Strickland* Court's decision to vacate and remand, the Court of Appeals for the Eighth Circuit held that the plaintiffs' right to procedural due process had been violated by the expulsion procedure utilized by the defendants. Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975). The Eighth Circuit further ruled that the students were entitled to prove their claim of damages against the school board members by demonstrating that the defendants did not act in good faith as defined by the Supreme Court. *Id.* at 747. The court found that the good faith qualified immunity had not been established as a matter of law and therefore remanded that factual question to the district court for determination. *Id.*

[153] 419 U.S. 565 (1975).

[154] 420 U.S. 308 (1975).

[155] *But see* Goss v. Lopez, 419 U.S. 565, 580-81 (Powell, J., dissenting).

[156] *See* notes 2 & 7 *supra*.

[157] Glasser & Levine, *supra* note 150, at 229.

[158] West Virginia v. Barnette, 319 U.S. 624, 637 (1943).